2004

State of Utah v. Shayne E. Todd : Brief of Respondent

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	Case No. 20041012-SC
v.	:	
SHAYNE E. TODD,	:	
Defendant/Petitioner.	:	

BRIEF OF RESPONDENT

ON WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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BRIEF OF RESPONDENT ON CERTIORARI REVIEW

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JURISDICTION AND NATURE OF PROCEEDINGS

This Court granted limited certiorari review of the court of appeals' decision in *State v. Todd*, 2004 UT App 266, 98 P.3d 46 (attached in **Addendum A**). *See also* **Addendum B** (Order Granting Certiorari pursuant to Utah Code Ann. § 78-2-2(5) (West 2004)).

STATEMENT OF ISSUE PRESENTED FOR REVIEW AND STANDARD OF REVIEW

Issue 1: Does "an oral announcement of sentence prior to entry of judgment constitute[] an imposition of that sentence for purposes of rule 24(c) of the Rules of Criminal Procedure"?

Standard of Review: On certiorari, this Court reviews the court of appeals' decision for correctness. *See State v. Dean*, 2004 UT 63, ¶ 7, 95 P.3d 276; *Thomas v. Color Country Management*, 2004 UT 12, ¶ 9, 84 P.3d 1201. "The interpretation of a rule of procedure is

a question of law that [this Court] reviews for correctness." *Brown v. Glover*, 2000 UT 89, ¶ 16, 16 P.3d 540; *see also State v. Brooks*, 908 P.2d 856, 858-59 (Utah 1995); *State v. Wanosik*, 2001 UT App 241, ¶ 9, 31 P.3d 615, *aff'd* 2003 UT 46, 79 P.3d 937.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

This appeal requires interpretation of *rule 24, Utah Rules of Criminal Procedure*, and *rule 4, Utah Rules of Appellate Procedure*, both of which are attached in **Addendum C.**

STATEMENT OF THE CASE

On March 30, 1999, defendant was charged by information with one count of murder, a first degree felony under Utah Code Ann. § 76-5-203 (Supp. 1998), and one count of possession of a dangerous weapon by a restricted person, a second degree felony under Utah Code Ann. § 76-10-503 (Supp. 1998) (R. 2-9). The charges stemmed from the shooting death of his estranged wife as defendant drove the couple's Ford Blazer through a parking lot while she clung to the driver's door (R. 669:52, 68-69, 124, 136-37, 138; State's Exhibit #3). A weapons enhancement applied to the murder charge, and a habitual violent offender enhancement applied to both charges (R. 3). Defendant pled guilty to the possession charge, and the State agreed to drop the enhancements (R. 244). After a nine-day trial, the jury convicted defendant of murder (R. 464, 466; R. 677:4).

The procedural events relevant to the issue on review span nearly two years:

March 14, 2001	The trial court announced defendant's sentence at the sentencing hearing (R. 678:18-19).

March 22, 2001	Defendant filed a motion for a new trial (R. 516-18) (attached in **Addendum D**).[1]
March 28, 2001	The court entered its sentencing order (R. 685-86) (attached in **Addendum E**).
January 23, 2003	The trial court denied defendant's motion for a new trial in a signed, written order (R. 592-94).
February 21, 2003	Defendant filed a notice of appeal to this Court, which transferred the case to the court of appeals (R. 632-33, 656).

The court of appeals moved *sua sponte* for summary dismissal, seeking memoranda on the jurisdictional issue of whether defendant's motion for a new trial, which he filed between announcement of sentence and entry of judgment, was timely filed. The court later withdrew its motion and ordered the parties to address the issue in their briefs (Court Order dated August 22, 2003).

STATEMENT OF THE FACTS

On February 28th, 1999, defendant shot his estranged wife, Stephanie, in the head with a 10mm pistol while she hung onto the driver's door of the Blazer defendant drove

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[1]The clerk stamped the sentencing order on March 28, 2001, but did not formally enter it into the docket. Both parties have treated the order as "entered" on that date for purposes of this appeal. *But see* Pet. for Cert. at 8 n.2 (arguing for the first time that "the judgment was entered on June 23, 2003" when the court of appeals supplemented the record on appeal with a copy of the judgment, and the prior notice of appeal was therefore valid pursuant to rule 4(c), Utah Rules of Appellate Procedure). Defendant has waived any challenge to the date on which the judgment was entered because: 1) he did not raise the issue until he filed his cert petition; and 2) having raised it in his cert petition, he did not argue it in his opening brief. *See Debry v. Noble*, 889 P.2d 428, 442, 443-44, n.14 (Utah 1995).

through a parking lot at speeds between fifteen and thirty-five miles-per-hour (R. 669:52, 68-69, 124, 136-137, 138; State's Exhibit # 3). Stephanie dropped from the Blazer, unconscious and bleeding profusely from the wound to her head (R. 669:137-39). The Blazer immediately sped out of the parking lot without slowing down (R. 669: 55, 137-38, 153-54). When the paramedics arrived, they pronounced Stephanie dead (R 669: 138). A few days later, defendant was apprehended at a relative's house in Sunset, Utah (R. 670: 381-82; R. 671:559-61; R. 673: 788-89).

SUMMARY OF ARGUMENT

The appellate court's jurisdiction depends upon the timeliness of petitioner's notice of appeal, which depends in turn on the timeliness of his motion for new trial. A motion for new trial in a criminal case "shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period." Utah R. Crim. P. 24(c). Petitioner filed his motion following the announcement of sentence at the sentencing hearing and before entry of judgment. Precedent in this jurisdiction holds that a motion filed before judgment is untimely under the rule. That precedent is supported by the rules of appellate procedure relating to the filing of a direct appeal. Because defendant's new trial motion was untimely, his notice of appeal—filed nearly two years after the court entered the final judgment in the case—was untimely, and the court of appeals properly determined that it lacked jurisdiction over the appeal.

Defendant's arguments that any adverse interpretation of rule 24(c) should not apply to this case should be rejected as they are not within the scope of this Court's grant of certiorari review. They fail in any event. The court of appeals' interpretation of rule 24(c) does not represent either a "new rule" or a "clear break with the past" so as to prevent its retroactive application. Regardless, application to this case of the clarification announced herein is not a retroactive application and is generally permitted under standard appellate procedure.

As established by this Court's long-standing precedent, defendant may pursue post-conviction proceedings in which he will have a full and fair opportunity to establish his claims of entitlement to re-sentencing for purposes of pursuing a direct appeal. Nothing in this case establishes that the remedy is in any way inadequate or unfair under the facts of this case.

ARGUMENTS

POINT I

THE COURT OF APPEALS PROPERLY HELD THAT DEFENDANT'S MOTION FOR NEW TRIAL, FILED PRIOR TO ENTRY OF JUDGMENT, WAS UNTIMELY UNDER RULE 24(C), UTAH RULES OF CRIMINAL PROCEDURE, AND THEREFORE FAILED TO CONVEY JURISDICTION TO THE COURT TO CONSIDER DEFENDANT'S APPEAL

The court of appeals had jurisdiction over defendant's appeal only if it was timely filed. *See State v. Vessey*, 957 P.2d 1239, 1240 (Utah App. 1998). The appeal in this case would be timely filed if defendant complied with either rule 4, Utah Rules of

Appellate Procedure, or rule 24(c), Utah Rules of Criminal Procedure. Rule 4 provides that a notice of appeal is timely filed if it is "filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from." Utah R. App. P. 4(a). Rule 4(b) provides that "if a timely motion is filed in the trial court (1) for a new trial under Rule 24 of the Utah Rules of Criminal Procedure, . . . the time for appeal for all parties shall run from the entry of the order denying a new trial . . . ." Utah R. App. P. 4(b). Defendant's notice of appeal was filed nearly two years after entry of the trial court's final judgment. The notice of appeal was filed twenty-nine days after entry of the order denying defendant's motion for a new trial. If defendant's new trial motion was "timely" filed, it would have tolled the running of the time to perfect an appeal until a ruling on that motion was entered, and the notice of appeal filed following entry of the order denying the motion would have conferred jurisdiction over defendant's appeal to the appellate courts. *See* Utah R. App. P. 4(b).

Rule 24, Utah Rules of Criminal Procedure, provides that a motion for a new trial is timely if it is "made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period." Utah R. Crim. P. 24(c). The timeliness of a rule 24 motion is crucial: "An untimely motion for a new trial has no effect on the running of the time for filing a notice of appeal." *Burgers v. Maiben*, 652 P.2d 1320, 1321 (Utah 1982). Further, there is no provision in rule 4 for a pre-judgment motion to toll the time for filing a notice of appeal. *See* Utah R. App. P. 4(b) (addressed

to "post-judgment" motions and orders). Defendant argues that "imposition of sentence" occurs at the sentencing hearing when the trial judge announces the sentence, not when the final written judgment, sentence, and commitment is entered thereafter. Pet. Br. at 8-21. Under his interpretation, his new trial motion—filed eight days after the sentencing hearing—would be timely, would toll the running of the time for appeal once a judgment was thereafter entered, and would render timely the notice of appeal filed nearly two years later following a decision on his new trial motion. *Id.*

The court of appeals rejected defendant's argument, finding instead that "imposition of sentence" as used in Rule 24(c) meant completion of sentencing by entry of a final written order imposing sentence. *See State v. Todd*, 2004 UT App 266, ¶ 19, 98 P.3d 46. Because defendant's motion for a new trial preceded entry of the judgment, it was untimely and did not act to toll the time for filing defendant's notice of appeal. *Id.* at ¶ 22. *See also State v. Vessey*, 957 P.2d 1239, 1240 (Utah App. 1998) (a premature motion for new trial does not affect the running of the time for filing an appeal). Absent a timely notice of appeal, the court of appeals was without jurisdiction to reach the merits of defendant's appeal and properly dismissed the appeal. *Id.*

A. The Language and Logic of Criminal Rule 24 Require a Motion for New Trial to be Filed After Entry of Judgment

Statutory Construction Principles. When interpreting the rules, this Court applies principles of statutory construction. *See State v. Vargas*, 2001 UT 5, ¶ 31, 20 P.3d 271 (quoting *Butler v. Naylor*, 1999 UT 85, ¶ 9, 987 P.2d 41). The Court looks to the

plain language of the rule and "assumes that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." *Savage Indus., Inc. v. Utah State Tax Comm'n*, 811 P.2d 664, 670 (Utah 1991). "'The plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and 'with other statutes under the same and related chapters.'" *State v. Schofield*, 2002 UT 132, ¶ 8, 63 P.3d 667 (quoting *Lyon v. Burton*, 2000 UT 19, ¶ 17, 5 P.3d 616) (additional quotations omitted), *cert. denied*, 540 U.S. 820 (2003). Under these well-settled principles, the court of appeals' reading of rule 24(c), Utah Rules of Criminal Procedure, is correct.

Judicial precedent involving rule 24. The narrow legal question raised by this appeal is whether a motion under rule 24, Utah Rules of Criminal Procedure, which is filed *before* entry of judgment is "made within 10 days *after* imposition of sentence" and is therefore "timely" under rule 4(b), Utah Rules of Appellate Procedure.

Defendant's argument focuses on defining "imposition" and "entry of judgment," ultimately concluding that "imposition of sentence" and "entry of judgment" "are separate events" and that the triggering event in the timeliness provision of rule 24(c) is the oral announcement of sentence, not the subsequent entry of judgment. Pet. Br. at 8-11. The court of appeals, however, recognized that the triggering event is the "imposition of sentence," and that more than "the oral indication of a sentence" is necessary to constitute the "imposition of sentence[.]" *Todd*, 2004 UT App 266, ¶ 18. The decision recognizes

that "imposition of sentence" in the criminal context necessarily encompasses "entry of the [written] order imposing sentence[.]" *Id.* at ¶ 19.

State v. Vessey, 957 P.2d 1239 (Utah App. 1998), referenced by the court of appeals, is the first published opinion to analyze the appellate implications of a rule 24 motion filed before entry of judgment. *Vessey* holds that the language of rule 24 is "plain," and that such a motion is premature and thus untimely. *Id.* at 1240. The opinion provides:

> The language of the rule [24(c)] is clear. The rule does not provide for timeliness of motions filed after announcement, but prior to entry of judgment, as is the case with rule 4(c) of the Utah Rules of Appellate Procedure. Rather, rule 24 requires that a motion for new trial be filed within ten days *after* imposition of *sentence*.

Id. (emphasis in original; footnote omitted).[2] The court went on to determine that, because the motion filed "after conviction[] but before sentencing" was premature and hence untimely, it did not amount to the requisite "post-judgment motion" which would have tolled the time for filing a notice of appeal. *Id.* The inescapable implication of the ruling is that, absent the express distinction between announcement of sentence and entry

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[2]Rule 4(c), Utah Rules of Appellate Procedure, provides:

> Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

of judgment in the rule, the reference to "imposition of sentence" necessarily encompassed both aspects of sentencing. *Id.*

Two years after *Vessey*, this Court touched upon the same issue and "implicitly upheld *Vessey* in *State v. Gardner*, 2001 UT 41, 23 P.3d 1043." *State v. Putnik*, 2002 UT 122, ¶¶ 5-6, 63 P.3d 91. Gardner filed a motion to suppress. *Gardner*, 2001 UT 41, ¶ 2. After his motion was denied, he filed a motion to reconsider based on what he asserted was new evidence. *Id.* Three days later he entered a conditional guilty plea, reserving the suppression issue for appeal. *Id.* At sentencing, the trial court "allowed him to amend his previously filed motion to reconsider as an amended motion to reconsider his motion to suppress." *Id.* at ¶ 3. On appeal, the State argued that the Court lacked jurisdiction because Gardner's motion to reconsider did not fit within any of the categories of post-judgment motions that toll the time for appeal under appellate rule 4(b). *Id.* at ¶ 5.

This Court "construe[d] defendant's motion for reconsideration in this case as a motion for new trial." *Id.* at ¶ 7. It further "construe[d] defendant's amended motion, which bears the same date as the judgment, sentence and commitment, as a motion filed in response to the imposition of sentence." *Id.* at ¶ 8. This Court held that the amended motion was filed "in response to"—that is, *after*—sentence under rule 24 because it bore "the same date as the judgment, sentence, and commitment[.]"[3] *Id.* In other words, the

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[3]"[I]n response to" necessarily translates as "after" because, under rule 24(c) of the Utah Rules of Criminal Procedure, the motion must be brought within ten days *after* imposition of sentence.

motion was timely filed under rule 24(c) because it was filed *after* the written judgment and not prior thereto. *See id.*; *see also Vessey*, 957 P.2d at 1240. As in *Vessey*, the focus of the Court's concern was on the entry of the written judgment, which act completes the trial court's sentencing of defendant and is necessary to the "imposition of sentence."

A year later, this Court again reaffirmed *Vessey* in *State v. Putnik*, 2002 UT 122, ¶ 6. Putnik filed his motion for a new trial "[a]fter trial but before sentencing[.]" *Id.* at ¶ 1. This Court rejected a challenge to the timing provision of rule 24(c) and relied on *Vessey* to affirm the dismissal of the appeal for lack of jurisdiction. In so doing, the Court reiterated:

> In *State v. Vessey*, the court of appeals held that a motion for a new trial filed prior to the imposition of sentence was not timely. 957 P.2d 1239 (Utah Ct. App. 1998). The court of appeals explained that 'The rule does not provide for timeliness of motions filed ... prior to entry of judgment....'

Id. at ¶ 5 (quoting *Vessey*, 957 P.2d at 1239-40).

This line of cases fully supports the court of appeals' determination in this case that "imposition of sentence" extends beyond "the oral indication of a sentence" to include the entry of judgment. *Todd*, 2004 UT App 266, ¶ 19.

Related precedent. To further support its clarification of the phrase "imposition of sentence," the court of appeals pointed to two cases which establish: 1) the mere announcement of a sentence does not prevent entry of a different sentence, and 2) in such a situation, the defendant has still "only been sentenced once for the crime" where only one written sentencing order is entered to complete the sentencing process. *See Todd*,

2004 UT App 266, ¶¶ 15-18 (citing *State v. Wright*, 904 P.2d 1101 (Utah App. 1995), *cert. denied*, 916 P.2d 909 (Utah 1996)), and *State v. Curry*, 814 P.2d 1150 (Utah App. 1991) (per curiam)). In other words, sentencing is not fully and finally imposed until entry of a written sentencing order.

In each of these cases, the defendants received two sentencing hearings, after which a single written judgment was entered. *See Wright*, 904 P.2d at 1102; *Curry*, 814 P.2d at 1150. The sentence that was announced at the initial sentencing hearing in each case was not the same sentence that was ultimately entered in the matter *See Wright*, 904 P.2d at 1102 (entry of final sentence delayed by court to review presentence report, after which the court entered a written order that omitted a probationary period originally announced); *Curry*, 814 P.2d at 1150 (entry of final sentence delayed at defendant's request for a ninety-day evaluation, after which the judge ran the sentences consecutively rather than concurrently, as originally announced). The appellate court in each case determined that the sentence originally announced was neither final nor appealable until reduced to writing. *See Wright*, 904 P.2d at 1103; *Curry*, 814 P.2d at 1151. In other words, sentencing was incomplete. Further, neither defendant had been sentenced more than once for their crimes, and sentencing was completed "when the written sentencing order was entered[,]" not upon oral pronouncement of the intended sentence. *See Todd*, 2004 UT App 266, ¶¶ 16, 18 (citing *Wright*, 904 P.2d at 1103, and *Curry*, 814 P.2d at 1151).

Where the plain language of rule 24c is devoid of any basis upon which to limit the scope of the term "imposition of sentence" to exclude the entry of judgment or to distinguish it from the oral sentencing component, these decisions provide additional support for the court of appeals' clarification that "imposition of sentence" equates to "entry of the order imposing sentence[.]" *Todd*, 2004 UT 266, ¶ 19. Defendant provides no reasonable rationale for providing an interpretation of rule 24 which is inconsistent with these holdings that defendants were not "sentenced" upon oral pronouncement but only upon entry of the written judgment. The cases reinforce that entry of judgment is far from being a merely "ministerial" act (Pet. Br. at 9), but is an integral part of every sentence. *See also State v. Gerrard*, 584 P.2d 885, 886 (Utah 1978) (oral statements from the bench are not the judgment of the court; "it is the sentence itself which constitutes a final judgment from which appellant has the right to appeal"); *see also State v. Bowers*, 2002 UT 100, ¶ 4, 57 P.3d 1065 (it is not the announcement of the intended sentence at the sentencing hearing, but "'the sentence itself which constitutes a final judgment from which appellant has the right to appeal'") (quoting *Gerrard*, 584 P.2d at 886). A defendant is not "sentenced" until entry of the final sentencing order. *See Gerrard*, 584 P.2d at 886; *Wright*, 904 P.2d at 1103; *Curry*, 814 P.2d at 1151. Hence, sentencing cannot be fully "imposed" prior to entry of the final sentencing order.[4]

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[4]Because the court of appeals' interpretation of rule 24(c) comports with the plain language of the rule and the precedent in this jurisdiction, resort to federal interpretations of corresponding federal rules to interpret rule 24 is unnecessary. *See Vargas*, 2002 UT

B. The Court of Appeals' Decision Avoids the Unnecessary Confusion Which Follows Defendant's Interpretation of the Rule

The principles of statutory and rule construction provide that "the plain language of a rule 'is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same [rule]'" and with other rules. *Vargas*, 2001 UT 5, ¶ 31 (applying the principles of statutory construction to interpretation of rules); *see also Schofield*, 2002 UT 132, ¶ 8 (providing for interpretation of statutes "'with other statutes under the same and related chapters'") (quoting *Lyon*, 2000 UT 19, ¶ 17) (additional quotations omitted). The statutory words are not read literally where "such a reading is unreasonably confused or inoperable." *State v. Bluff*, 2002 UT 66, ¶ 34, 52 P.3d 1210 (rejecting an interpretation of a statute which would render part of the statute inoperable), *cert. denied*, 537 U.S. 1172 (Utah 2003).

5, ¶ 31, n.8 (quoting *State v. Banner*, 717 P.2d 1325, 1333-34 (Utah 1986)) (acknowledging the ability to look to federal rules but not relying on the federal counterpart of rule 404, Utah Rules of Evidence, because of a conflict in the federal interpretation of the relevant part).Regardless, the federal equivalent to Utah's criminal rule 24 avoids the quandary presented herein by running the filing period for a new trial motion from verdict rather than judgment. *See* Fed. R. Crim. 33(b)(2). Prior to a 1998 amendment, it ran the time from "final judgment." *Id.*, Notes of Advisory Committee on 1998 Amendment.

Defendant's reference to a recent amendment of rule 35 of the Federal Rules of Criminal Procedure is similarly unhelpful. The statute relates to correction or reduction of a sentence. The recent addition of a definition for "sentencing" promotes uniformity in the interpretation of the federal rule, but is neither binding nor relevant to the interpretation at hand where Utah's appellate courts have had no difficulty in interpreting the timeliness provision of rule 24(c).

The court of appeals' interpretation of rule 24. The court of appeals' clarification that rule 24(c) requires that a new trial motion be filed following entry of a final judgment harmonizes with the rules of appellate procedure to provide for the filing of both the motion and a single, comprehensive direct appeal in an efficient and effective manner. Rule 4(b), Utah Rules of Appellate Procedure, entitled "Motions *post judgment* or order" (emphasis added), pre-supposes that the listed motions are post-judgment, and works efficiently to effectuate appeals involving such motions. If a new trial motion is timely filed within ten days after entry of the judgment, as required by the court of appeals, it tolls the running of the time for filing an appeal which had begun upon entry of the judgment. *See* Utah R. App. P. 4(a) & (b); Utah R. Crim. P. 24(c); *see Vessey*, 957 P.2d at 1240 (a timely post-judgment motion under criminal rule 24 would "toll[] the time for filing a notice of appeal" under rule 4); The time for filing the appeal does not begin again until entry of the order denying the new trial motion, at which point a timely-filed notice of appeal would effect a single, comprehensive appeal encompassing both defendant's conviction and sentence as well as the denial of the new trial motion.

Defendant's interpretation of rule 24. In contrast, the court of appeals recognized that defendant's more literal reading of the language in rule 24(c) would result in procedural confusion when viewed in conjunction with appellate rule 4. *See Todd*, 2004 UT App 266, ¶ 20. The panel voiced its concern through a hypothetical:

> . . . Defendant's interpretation [of rule 24], in certain circumstances, would require either two appeals in a single case or a single appeal, taken

> prior to the entry of final judgment. For example, if the court announced sentence, a defendant immediately filed his motion for a new trial, and the court immediately entered its order denying the motion, but did not enter its order imposing sentence until some months later, in defendant's view, either the notice of appeal would have to be filed within thirty days of denial of the motion—months before the entry of final judgment—or two notices of appeal would be required: one filed within thirty days of denial of the motion and one filed within thirty days of the entry of final judgment.

Id.

This example is a clear and concise statement of a situation that may well occur under defendant's interpretation of Utah Rule of Criminal Procedure 24(c). As the court recognized, the outcome is inconsistent "with the familiar policy favoring one appeal per case, which appeal should follow entry of final judgment. *See, e.g.,* Utah R. App. P. 4; Utah R. App. P. 5; Utah R. Civ. P. 65B; Utah Code Ann. § 78-35a-106(1)(c) (2002)[.]" *Todd*, 2004 UT App 266, ¶ 20.

Defendant argues that the confusion voiced by the court of appeals would not materialize because of rule 4(c), Utah Rules of Appellate Procedure. Pet. Br. At 19-21. That rule provides

> . . . . *Except as provided in paragraph (b) of this rule*, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

Utah R. App. P. 4(c) (emphasis added). Defendant claims that this section would apply to the court of appeals' hypothetical and would prevent the confusion. Pet. Br. at 20-21, & n.5. He argues that subsections (b) and (c) would combine to prohibit the hypothetical

defendant from filing a notice of appeal between the time the court orally denied his new trial motion and the time it entered its written order. *Id.* Once the order was entered, he claims, subsection (b) would require the defendant to file a notice of appeal within thirty days. *Id.* Subsection (c) would thereafter permit the same notice of appeal to be treated as being filed on the day final judgment was later entered. *Id.* In other words, the same notice of appeal timely filed within thirty days of entry of the order on defendant's motion would also be considered to be filed and become effective "some months later" under the court of appeals' hypothetical.

Defendant's argument raises several concerns. First, upon filing the notice of appeal, the appeals process would be underway without the final judgment or order required by rule 3(a). *See* Utah R. App. P. 3(g) (requiring the trial court clerk, on receipt of the notice of appeal, to forward it for docketing in the appellate court). Defendant's interpretation would arguably increase the number of cases requiring special treatment on appeal to ensure the case was held pending entry of the final judgment.

Second, the prefatory language of subsection (c) is susceptible to an alternative interpretation, generating additional confusion. The language "Except as provided in paragraph (b) of this rule . . . ." may be read as completely excepting from subsection (c) all cases involving the filing of one of the motions listed in subsection (b). Under this interpretation, subsection (b) would control the remainder of the case, and subsection (c) would not apply upon entry of the final judgment to permit the earlier notice of appeal to

encompass the judgment. Instead, as the court of appeals noted, defendant would be required to file a second notice of appeal under rule 4(a) within thirty days of the entry of the final judgment, imposing an unnecessary burden on the courts and on judicial resources. *See Todd*, 2004 UT App 266, ¶ 20.

Defendant's interpretation of rule 24 generates confusion and procedural concerns when read together with the appellate rules. The court of appeals properly clarified the language of rule 24(c) in a manner which harmonized the rule with the appellate rules and provided for the most efficient and effective handling of post-judgment motions and direct appeals. This latter interpretation best meets the requirements of the principles of statutory construction and should be affirmed. *See Schofield*, 2002 UT 132, ¶ 8 (interpreting a statute in harmony with related statutes to accomplish the underlying purpose); *Bluff*, 2002 UT 66, ¶ 35 (rejecting, as impermissible under the plain language of the rule, an interpretation of a statute which would "render portions of the statute redundant, superfluous, and inoperable"); *see also* 2A Norman J. Singer, *Statutes and Statutory Construction* § 45:12, at 81-82 (6th ed. 2000) ("It [is] a golden rule of statutory interpretation that, when one of several possible interpretations produces an unreasonable result, that is a reason for rejecting that interpretation in favor of another which would produce a reasonable result").

C. Defendant's Retroactivity Arguments Do Not Warrant Review; Alternatively, They Lack Merit

Defendant argues that if this Court affirms the court of appeals' interpretation of the timeliness provision of rule 24(c), it should apply that interpretation prospectively and not retroactively. Pet. Br. at 21-23. In any event, he argues, it should not apply to this case because it would violate his constitutional rights to fair notice and due process. *Id.* at 24-29.

Denial of Certiorari Review. This Court should not address these arguments because they are outside the scope of this Court's grant if certiorari review. The law is well-settled that this Court will review on certiorari "'[o]nly the questions set forth in the petition or fairly included therein' and for which certiorari is granted." *DeBry v. Noble*, 889 P.2d 428, 443 (Utah 1995) (quoting Utah R. App. P. 49(a)(4)).

This Court granted cert solely on the issue of "Whether an oral announcement of sentence prior to entry of judgment constitutes an imposition of that sentence for purposes of rule 24(c) of the Rules of Criminal Procedure." Order dated Feb. 10, 2005 (Add. B). Defendant's arguments involving retroactive application and violation of constitutional rights are not fairly included in this statement. The petition specifically requests review "on the appropriate procedure to follow" in this case and seeks re-sentencing. Pet. for Writ of Certiorari at 20. These arguments were not included in the Court's review order. Consequently, defendant is precluded from certiorari review of his arguments.

Further, defendant's failure to raise the retroactivity issue before the court of appeals prevents review at this time. *See DeBry*, 889 P.2d at 443-44 ("Issues not raised in the court of appeals may not be raised on certiorari unless the issue arose for the first time out of the court of appeals' decision"). In the court of appeals, defendant implicitly recognized that an adverse ruling by the court would apply to him, prompting him to seek issuance of a "writ" in aid of the court's jurisdiction to permit his direct appeal to continue. Br. of Aplt. at 48-49. He made no retroactivity argument. In both his petition for rehearing and his cert petition, defendant again implicitly acknowledged that the court of appeals' decision applied to his case, prompting him to seek a remand for re-sentencing. Pet. for Rehearing at 4-15; Pet. for Writ of Certiorari at 12-20.[5] Again, he made no retroactivity argument. Now, however, he argues against application of any adverse interpretation of rule 24, seeking an exception that would permit his appeal to proceed. Pet. Br. at 21-29. The issue did not arise for the first time out of the court of appeals' decision, and, having failed to timely raise this argument, defendant should be denied review. *See DeBry*, 889 P.2d at 443-44.

In any event, his arguments are without merit.

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[5]He repeats the request for re-sentencing in his brief on cert. *See* Pet. Br. at 29-40. The State responds in subsection D, *infra*.

Retroactive application. Defendant argues that the court of appeals' interpretation of "imposition of sentence" should not be applied retroactively to his case, but only prospectively. Pet. Br. at 21-23.

When a new rule governing criminal procedure constitutes a clear break with the past, it is not generally applied retroactively. *See State v. Gordon*, 913 P.2d 350, 354 (Utah 1996) (declining to apply a new cautionary policy involving appointment of a city attorney to represent an indigent defendant to a case pre-dating the judicial announcement of the new rule); *State v. Baker*, 935 P.2d 503, 508-09 (Utah 1997) (where "cure-or-waive" rule is simply an extension of preexisting principles from past cases, it is not a "new rule" subject to prospective application only); *State v. Hoff*, 814 P.2d 1119, 1123 (Utah 1991) (declining to retroactively apply strict compliance of rule in taking of guilty pleas). Defendant's argument against retroactive application of the court of appeals' interpretation of rule 24(c) fails on at least two grounds. First, the interpretation does not constitute either a "new rule" or "a clear break with the past" where it merely confirms the meaning of a phrase in an established rule consistently with precedent. *See Vessey*, 957 P.2d at 1240; *see also Putnik*, 2002 UT 122, ¶¶ 5-6; *Baker*, 935 P.2d at 508-09 (rule that "fills a vacuum in the law by extending preexisting principles from past cases" is not a "new rule" for purposes of retroactive application). Absent any "clear break," there is no bar to retroactive application of the rule change. *See Baker*, 935 P.2d at 508-09.

Second, even if the clarification is viewed as a "new rule," its application to the case at bar does not amount to retroactive application. Under standard appellate procedure, "[a] new rule announced on direct appeal typically applies to the case in which it is announced." *Id.* at 509; *see, e.g., State v. Ramirez*, 817 P.2d 774, 781-82 (Utah 1991) (new state constitution-based rule for eyewitness identification testimony found satisfied); *State v. Gibbons*, 740 P.2d 1309, 1313 (Utah 1987) (new rule for taking guilty pleas applied, allowing defendant to withdraw his plea).

Application to this case. Defendant alternatively argues that if this Court affirms the court of appeals' interpretation of rule 24(c), it should not apply that ruling to him in this case because it would violate his state and federal constitutional right to fair notice and due process. Pet. Br. at 24-29. He claims that he lacked adequate notice as to the proper interpretation of rule 24(c) because the decision unexpectedly departs from decisions in other jurisdictions interpreting the language and articulates a "new standard" which he could not anticipate in time to preserve his direct appeal. *Id.*

However, the court of appeals did not announce a "new standard" or otherwise deviate from the language in rule 24(c). Defendant had ample notice of how the relevant rule was interpreted *in this jurisdiction* by means of the decisions in *Vessey*, *Gardner*, and *Putnik*. His alleged reliance on decisions from other jurisdictions in conforming his actions to Utah's procedural rules is unreasonable and does not establish vagueness or ambiguity in Utah's rule. Pet. Br. at 26-27.

D. Defendant Abandoned His Request for Re-Sentencing; In Any Event, He has an Adequate Remedy in Post-Conviction Proceedings

Defendant Abandoned this Argument Below. Review of defendant's request for a remand for re-sentencing is inappropriate where he abandoned his claim below. *See Berg v. Otis Elevator Co.*, 64 Utah 518, 231 P. 832, 838 (1924) (denying a petition for rehearing, noting "It is a well-established rule in this jurisdiction that when an assignment is ignored in the briefs of the party who assigns the error, the alleged error is deemed abandoned and waived and is not thereafter subject to resurrection).

Defendant initially requested a remand for re-sentencing in response to the court of appeals' *sua sponte* motion for summary dismissal of this appeal on jurisdictional grounds. Reply Br. of Aplt. at 22 (attached in **Addendum F**). Once the court of appeals withdrew its motion, defendant did not re-assert the claim until after the opinion issued. Defendant's attempt to resurrect the claim in his petition for rehearing was denied by the court of appeals.

Accordingly, this Court should not reach the merits of defendant's request for re-sentencing. *See Berg*, 231 P. at 838.

Post-conviction is an adequate and effective remedy. Even on its merits, defendant's argument fails because post-conviction presents an adequate and effective remedy. Defendant argues that if this Court affirms the court of appeals' decision, it should invoke its supervisory, constitutional, or rule powers to order a remand for re-

sentencing in the original criminal proceeding to prevent defendant from having "to forego his right to a direct appeal." Pet. Br. at 29-40.

What defendant requests is not procedurally appropriate. "It is axiomatic in this jurisdiction that failure to timely perfect an appeal is a jurisdictional failure requiring dismissal of the appeal." *Prowswood, Inc. v. Mountain Fuel Supply Co.,* 676 P.2d 952, 955 (Utah 1984). This Court has long-since established the appropriate method by which to address claims that a defendant has been denied his direct appeal. The appeal must be dismissed without more, after which defendant may seek his remedy by pursuing post-conviction review in the trial court under the Utah Postconviction Remedies Act, *see* Utah Code Ann. § 78-35a-101, *et seq.* (2001); rule 65C, Utah Rules of Civil Procedure; and *State v. Johnson*, 635 P.2d 36, 38 (Utah 1981). *See State v. Jiminez*, 938 P.2d 264, 264 (Utah 1997); *State v. Palmer*, 777 P.2d 521, 522 (Utah App. 1989) ("a convicted defendant's claim he has been denied his constitutional right to an appeal should be presented to the sentencing court pursuant to a motion for post-conviction relief").

Twenty years ago in *State v. Johnson*, this Court held that a defendant is entitled to a *post-conviction* hearing on his allegations that he lost his right to appeal through his counsel's ineffectiveness. *Johnson*, 635 P.2d at 38. Only if he can demonstrate on post-conviction that he lost his right to appeal through no fault of his own should he "be resentenced *nunc pro tunc* upon the previous finding of guilty so as to afford him 'an opportunity of prosecuting and perfecting an appeal, since the time for taking such appeal

would date from the rendition of the new judgment.'" *Id.* (footnote omitted); *see also Bruner v. Carver*, 920 P.2d 1153, 1155, 1156 (Utah 1996) (post-conviction case recognizing that a defendant who knowingly forgoes his right to appeal is not entitled to re-sentencing). *Johnson* does not provide for automatic return to the original criminal proceeding without post-conviction review, as defendant claims. Pet. Br. at 30-31, 38 n.6.

More recently, in *State v. Jiminez*, this Court dismissed defendant's criminal appeal on the ground that it was untimely filed, then noted: "In dismissing the appeal, we recognize that our action may deprive this defendant of his constitutional right to an appeal. Therefore, he may file a petition for a writ of habeas corpus in the trial court under Utah Code Ann. §§ 78-35a-101 to -110." *Jiminez*, 938 P.2d at 265. The Court continued: "The trial court should then follow the procedure outlined in Utah Rule of Civil Procedure 65(c) . . . . The direct appeal is provided by means of the re-sentencing procedure outlined in *State v. Johnson*, 635 P.2d 36, 38 (Utah 1981)." *Id.*

This established method provides defendant with an effective and adequate remedy in the post-conviction arena which will enable him to perfect a direct appeal, provided he establishes his entitlement to one. His summary and self-serving claims of entitlement in his brief are insufficient by themselves, and he presents no valid basis upon which this Court should find that resort to post-conviction is unnecessary or inadequate. His reliance on *Johnson* and *Boggess v. Morris*, 635 P.2d 39 (Utah 1981), is misplaced as both cases

involved the pursuit of post-conviction proceedings to establish an entitlement to re-sentencing. Pet. Br. at 30-33. Further, the State is entitled to an opportunity to challenge defendant's claims and to establish that they are without merit. His claim of "good faith" and absence of fault as well as his suggestions of ineffective assistance of counsel warrant scrutiny, especially in light of the "clear" language of rule 24(c) as stated in *Vessey* and reaffirmed in *Putnik.* Pet. Br. at 28, 29, 30, 33, 37, 40. The procedural posture of this case is not the appropriate forum for such scrutiny. *See Johnson*, 635 P.2d at 38.

The procedure outlined in *Johnson* and *Jiminez* provides defendant with a valid and appropriate avenue by which to protect his constitutional right to appeal from his convictions. This Court should reject defendant's attempt to manipulate the judicial system by attempting to by-pass procedural guidelines established by rule, by statute, and by prior case law.

CONCLUSION

"'An untimely motion for a new trial has no effect on the running of the time for filing a notice of appeal.'" *State v. Vessey*, 957 P.2d 1239, 1240 (Utah App. 1998) (quoting *Burgers v. Maiben*, 652 P.2d 1320, 1321 (Utah 1982)). For the reasons stated herein, defendant's motion for a new trial was not timely under the plain language of rule 24 of the Utah Rules of Criminal Procedure. As a consequence, no post-judgment motion tolled the time for filing a notice of appeal. Appellate rule 4(a) dictates that the time expired thirty days after the March 28, 2001, entry of the trial court's final judgment

pursuant to rule 4(a) of the Utah Rules of Appellate Procedure. Defendant's notice of appeal, filed nearly two years later, was outside the time permitted by the rules, and the court of appeals properly determined that it lacked jurisdiction to hear the appeal. *See Todd*, 2004 UT App 266, ¶ 22. For this reason, the State respectfully requests that this Court affirm the decision of the court of appeals.

RESPECTFULLY submitted this 15th day of August, 2005.

MARK SHURTLEFF
Utah Attorney General

KRIS C. LEONARD
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 2005, two copies of the foregoing BRIEF OF RESPONDENT were hand-delivered/mailed, postage pre-paid, to the following:

LINDA M. JONES
SALT LAKE LEGAL DEFENDER ASSOC.
Attorneys for Defendant/Petitioner
424 East 500 South, Suite 300
Salt Lake City, UT 84111

Addenda

Addendum A

H

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Shayne E. TODD, Defendant and Appellant.

No. 20030157-CA.

Aug. 12, 2004.
Rehearing Denied Sept. 30, 2004.

Background: Defendant was convicted in the Third District Court, Salt Lake Department, Dennis M. Fuchs, J., of murder and possession of a weapon by a restricted person. Defendant appealed.

Holding: The Court of Appeals, Orme, J., held, as a matter of first impression, that oral sentencing was not final, and thus, Court of Appeals lacked jurisdiction of appeal.
Appeal dismissed.

West Headnotes

[1] Courts ⚿**4**
106k4 Most Cited Cases
[1] Courts ⚿**24**
106k24 Most Cited Cases
[1] Courts ⚿**37(1)**
106k37(1) Most Cited Cases
Subject-matter jurisdiction is derived from the law; it can neither be waived nor conferred by consent of the accused.
[2] Courts ⚿**37(1)**
106k37(1) Most Cited Cases
[2] Courts ⚿**37(2)**
106k37(2) Most Cited Cases
Objection to the jurisdiction of the court over the subject matter may be urged at any stage of the proceedings, and the right to make such an objection is never waived.
[3] Criminal Law ⚿**1081(6)**
110k1081(6) Most Cited Cases
An untimely motion for a new trial has no effect on the running of the time for filing a notice of appeal. Rules Crim.Proc., Rule 24(c).
[4] Criminal Law ⚿**1023(11)**
110k1023(11) Most Cited Cases
Sentencing was not final until entered in writing, and thus, appeal from oral sentencing for murder was untimely. Rules Crim.Proc., Rule 24(c).
[5] Criminal Law ⚿**1069(6)**
110k1069(6) Most Cited Cases
If an appeal is not timely filed, an appellate court lacks subject-matter jurisdiction to hear the appeal.
[6] Courts ⚿**40**
106k40 Most Cited Cases
When a matter is outside the court's subject-matter jurisdiction, it retains only the authority to dismiss the action.
*47 Linda M. Jones, Salt Lake City, for Appellant.

Mark L. Shurtleff, Atty. Gen., and Kris C. Leonard, Asst. Atty. Gen., Salt Lake City, for Appellee.

Before BILLINGS, P.J., DAVIS, and ORME, JJ.

OPINION

ORME, Judge:

**1 Defendant Shayne Todd was convicted of murder, a first degree felony under Utah Code Ann. § 76-5-203 (2003), and possession of a dangerous weapon by a restricted person, a second degree felony under Utah Code Ann. § 76-10-503(3) (2003) . Defendant claims the trial court erred in failing to grant his motion for a new trial, which was based on allegedly improper statements made by the prosecutor during closing argument. Because Defendant's motion for new trial was not timely filed, we dismiss the appeal for lack of jurisdiction.

BACKGROUND

**2 Defendant and the victim were married, but had separated. In February 1999, the victim was living with her new boyfriend. Since their estrangement, the victim had maintained physical possession of a Chevrolet Blazer, which Defendant had purchased prior to their marriage. Defendant

permitted the victim to continue using the Blazer, on the condition that the boyfriend not drive the car. On February 28, 1999, Defendant, seeing the Blazer parked in front of the victim's house, decided to take the vehicle using a key he had retained. Defendant took the Blazer, along with some of the victim's personal property that happened to be inside the Blazer, including her purse.

**3 When the victim noticed the Blazer was missing, she phoned the police, who told her they could not help her retrieve the car from Defendant because the car was titled in both their names and they were still legally married. Later in the day, the victim called Defendant, and they arranged to meet in a parking lot where Defendant would return the personal property.

**4 That evening, the victim was driven by her brother to the agreed destination. They parked next to the already-arrived Blazer, and Defendant, who was still inside the Blazer, handed the victim's purse to her brother. Meanwhile, the victim exited the car, approached the driver's door of the Blazer, and began arguing with Defendant. Defendant began to drive away as the victim reached into the open window, but the victim held on to the door. The victim continued to hang on to the car as Defendant drove through the parking lot at increased speeds. The victim's brother, realizing what was happening, did a *48 U-turn and began to follow the Blazer. Suddenly, her brother heard a loud popping noise and saw the victim drop to the ground. The Blazer then sped out of the parking lot without slowing down. The victim had been shot in the head and was pronounced dead by the paramedics who responded to the scene. A day later, Defendant was apprehended at a relative's house.

**5 Defendant was charged with murder and possession of a dangerous weapon by a restricted person, with a weapons enhancement applied to the murder charge and a habitual violent offender enhancement applied to both charges. Defendant pled guilty to the possession charge and, in exchange, the State dropped both enhancements. After a nine-day jury trial, Defendant was convicted of murder.

**6 At trial, Defendant testified that he had brought the gun to the property exchange because he feared the boyfriend and another friend of the victim. He also testified that the gun, cocked and ready to be fired, rested in his lap when he was seated inside the Blazer and that when the victim jumped onto the Blazer, she grabbed the gun, and they struggled for possession of the gun, which accidentally fired.

**7 A sentencing hearing was held on March 14, 2001, in which the trial court orally announced Defendant's sentences. Defendant filed a motion for a new trial on March 22, 2001. On March 28, 2001, the court entered its written sentencing order, which constituted the final judgment in the case. Nearly two years later, by order entered on January 23, 2003, the trial court denied Defendant's motion for a new trial. On February 21, 2003, Defendant filed his notice of appeal.

ISSUES AND STANDARD OF REVIEW

**8 Defendant raises one issue on appeal: Did the trial court err in failing to grant Defendant's motion for a new trial based on statements made by the prosecutor during closing arguments? However, upon request of this court, both parties also briefed the question of whether Defendant's motion for a new trial was timely filed. *See* Utah R.App. P. 4(b) (stating that *timely* motion for new trial postpones time for appeal to thirty days after entry of order disposing of motion).

[1][2] **9 Subject matter jurisdiction "is derived from the law. It can neither be waived nor conferred by consent of the accused. Objection to the jurisdiction of the court over the subject matter may be urged at any stage of the proceedings, and the right to make such an objection is never waived." *James v. Galetka,* 965 P.2d 567, 570 (Utah Ct.App.1998) (internal quotations and citation omitted), *cert. denied,* 982 P.2d 88 (Utah 1999).

ANALYSIS

**10 On March 14, 2001, the trial court held a sentencing hearing, at which it orally pronounced Defendant's sentences. However, the trial court did not enter its written sentencing order until two weeks later, on March 28. [FN1] On March 22, between the time when the sentence was announced and when the sentencing order was entered,

Defendant filed a motion for a new trial. Nearly two years later, on January 23, 2003, the trial court denied Defendant's motion for a new trial, and on February 21, 2003, Defendant filed his notice of appeal.

> FN1. Pursuant to rule 22 of the Rules of Criminal Procedure, "[u]pon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence." Utah R.Crim. P. 22(c). Therefore, in a Utah criminal case, a final judgment occurs when the trial court enters the written judgment of conviction, including the sentence, into the record.

**11 Rule 24(c) of the Utah Rules of Criminal Procedure states that "[a] motion for a new trial shall be made within ten days after imposition of sentence." Defendant argues that the trial court's oral ruling at the sentencing hearing constituted the "imposition of sentence" for purposes of rule 24(c). Thus, because his motion for a new trial was filed within ten days after the sentencing hearing, Defendant insists his motion was timely. [FN2]

> FN2. Although filed nearly two years after his motion for new trial, Defendant's notice of appeal would be timely if the notice was filed within thirty days of entry of the order denying the motion, *see* Utah R.App. P. 4(a) (stating that "notice of appeal ... shall be filed ... within 30 days after the date of entry of the judgment or order appealed from"), assuming only that the motion for new trial was itself timely, i.e., filed within ten days after imposition of sentence. *See* Utah R.App. P. 4(b) (stating that timely motion for new trial tolls time for filing notice of appeal until "the entry of the order denying a new trial").

*49 **12 The State argues that "imposition of sentence" is not equivalent to the mere oral announcement of an intended sentence. Rather, the actual entry of the written order imposing sentence is what constitutes the "imposition of sentence," commencing the period for filing a timely motion for a new trial. *See* Utah R.Crim. P. 24(c). The State argues that because the motion for a new trial was filed prior to the "imposition of sentence," it was "premature and thus untimely." *State v. Putnik*, 2002 UT 122,¶¶ 5,8, 63 P.3d 91.

[3] **13 " 'An untimely motion for a new trial has no effect on the running of the time for filing a notice of appeal.' " *State v. Vessey*, 957 P.2d 1239, 1240 (Utah Ct.App.1998) (per curiam) (quoting *Burgers v. Maiben*, 652 P.2d 1320, 1321 (Utah 1982) (per curiam)). Because the motion for a new trial was untimely, the State argues that the time for filing the notice of appeal was not tolled. Thus, the State contends the notice of appeal had to be filed within thirty days of the entry of the written sentencing order, which occurred on March 28, 2001. *See* Utah R.App. P. 4(a). Alternatively, the motion for new trial could have been filed within ten days after the imposition of sentence, i.e., entry of the sentencing order, in which event the notice of appeal could then be filed within thirty days of the order denying the motion. Given that neither of these scenarios occurred, the State contends that this court is without jurisdiction over this appeal.

[4] **14 The jurisdictional issue in this case turns on whether the "imposition of sentence" under rule 24(c), Utah Rules of Criminal Procedure, is interpreted as the oral announcement of an intended sentence or entry of the written order imposing sentence. Although this precise issue appears to be one of first impression, Utah judicial opinions have discussed when a sentence is considered final for other purposes.

**15 "It is the law of this state, as announced in *State v. Curry*, 814 P.2d 1150 (Utah Ct.App.1991) (per curiam), that a sentence is not entered until it has been reduced to writing and signed by the court." *State v. Wright*, 904 P.2d 1101, 1102 (Utah Ct.App.1995), *cert. denied*, 916 P.2d 909 (Utah 1996). *Curry* involved a defendant whose sentence was orally pronounced by the trial court, after which he filed a motion to set aside the sentence and requested a ninety-day evaluation. *See* 814 P.2d at 1150. A hearing was held, and the court stated that it would not sign an order implementing the previously announced sentence and instead ordered a ninety-day evaluation of the defendant. *See id.* Following the ninety-day evaluation, the court again pronounced its sentence upon

defendant. However, this time the sentences were to run consecutively rather than concurrently, as had been previously announced. *See id.* The defendant appealed, arguing that his due process rights were violated when the trial court imposed a more severe sentence than what had been first announced. *See id.* at 1150-51.

**16 On appeal, this court held that "the oral statement from the court regarding defendant's sentence was not reduced to writing, and thus defendant's sentence was not entered until" after the second sentencing hearing when the sentence was actually reduced to writing. *Id.* at 1151. In reaching its conclusion in *Curry,* this court followed *Hinkins v. Santi,* 25 Utah 2d 324, 481 P.2d 53 (Utah 1971), which held that "a judgment and sentence is not final and appealable where the court orally finds defendant guilty and sentences him but fails to enter written findings of fact and a judgment." *Curry,* 814 P.2d at 1151 (citing *Hinkins,* 481 P.2d at 54).

**17 Additionally, in *State v. Wright,* 904 P.2d 1101 (Utah Ct.App.1995), the trial court orally announced a sentence, then one week later stated that it would not implement the tentative sentence until it had a chance to review the presentence report, specifically stating "[t]here is no judgment, there is no sentence until I sign those papers." *50 *Id.* at 1102. The trial court, at a later hearing, sentenced the defendant, but this time without the benefit of a thirty-six month probationary period, instead imposing a prison term. Following the second sentencing hearing, the trial court signed and entered its written sentencing order. *See id.*

**18 On appeal, this court "affirm[ed] the sentence imposed by the trial court," *id.* at 1103, noting that the defendant had "only been sentenced once for the crime," i.e., when the written sentencing order was entered. *Id.* Like *Curry, Wright* also follows the rule that a sentence is not appealable or otherwise final until entry of an order signed by the court. [FN3] Given these precedents, it is clear that the oral indication of a sentence does not constitute the "imposition of sentence" for purposes of determining the timeliness of a motion for new trial under Utah Rule of Criminal Procedure 24(c). [FN4]

FN3. The principle that a judgment, sentence, or order does not become final until it is reduced to writing and signed by the court has been reaffirmed in any number of contexts. *See, e.g., State v. Gardner,* 2001 UT 41,¶ 10, 23 P.3d 1043 (noting that "an appeal filed before a formal post-judgment order is entered is ineffective and a new appeal has to be filed within thirty days *after* the entry of the formal order"); *State v. Crowley,* 737 P.2d 198, 198 (Utah 1987) (per curiam) (stating that "[a]n unsigned minute entry does not constitute a final order for purposes of appeal"); *Wilson v. Manning,* 645 P.2d 655, 655 (Utah 1982) (per curiam) (holding that "[a]n unsigned minute entry does not constitute an entry of judgment, nor is it a final judgment for purposes of [appeal]"); *State v. Gerrard,* 584 P.2d 885, 887 (Utah 1978) (stating that oral statements made from the bench are not the judgment of the court and therefore are not appealable).

FN4. Defendant cites to several cases from other jurisdictions in support of his argument that "imposition of sentence" and entry of a formal, written sentence are two distinct acts. However, these cases have no binding effect in Utah, are at odds with the rule consistently followed in Utah, and are logically unpersuasive. *See, e.g., Kriebel v. United States,* 10 F.2d 762, 764 (7th Cir.1926); *State v. Trunnel,* 549 P.2d 550, 551 (Alaska 1976); *Rodarte v. State,* 840 S.W.2d 781, 782 (Tex.Ct.App.1992) (per curiam).

**19 This conclusion is consistent with *State v. Vessey,* 957 P.2d 1239 (Utah Ct.App.1998) (per curiam), in which this court examined "what constitute [d] a 'timely' motion for new trial" pursuant to rule 24 of the Utah Rules of Criminal Procedure, *id.* at 1240, and in light of the language in rule 4(c) of the Rules of Appellate Procedure, which states: "[A] notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof." Utah R.App. P. 4(c). In *Vessey,*

this court concluded that rule 24 "does not provide for timeliness of *motions* filed after announcement, but prior to entry of judgment, as is the case with rule 4(c) of the Utah Rules of Appellate Procedure" with respect to notices of appeal. 957 P.2d at 1240 (emphasis added). *See* Utah R.Crim. P. 24(c). There is simply no such language in rule 24. Therefore, filing a motion for new trial prior to imposition of sentence, i.e., prior to entry of the order imposing sentence, will not be treated as filed after entry, as permitted in certain situations by rule 4(c), but rather must be regarded as untimely.

**20 Our interpretation of the phrase "imposition of sentence," and the resulting jurisdictional rule, are consistent with the familiar policy favoring one appeal per case, which appeal should follow entry of final judgment. *See, e.g.,* Utah R.App. P. 4; Utah R.App. P. 5; Utah R. Civ. P. 65B; Utah Code Ann. § 78-35a-106(1)(c) (2002) (stating that, ordinarily, "[a] person is not eligible for relief [under the Post-Conviction Remedies Act] upon any ground that," among other things, "could have been but was not raised ... on appeal"). In contrast, Defendant's interpretation, in certain circumstances, would require either two appeals in a single case or a single appeal, taken prior to the entry of final judgment. For example, if the court announced sentence, a defendant immediately filed his motion for a new trial, and the court immediately entered its order denying the motion, but did not enter its order imposing sentence until some months later, in defendant's view, either the notice of appeal would have to be filed within thirty days of denial of the motion--months before the entry of final judgment--or two notices of appeal would be required: one filed within thirty days of denial *51 of the motion and one filed within thirty days of the entry of final judgment.

[5][6] **21 "If an appeal is not timely filed, this court lacks jurisdiction to hear the appeal." *Serrato v. Utah Transit Auth.,* 2000 UT App 299,¶ 7, 13 P.3d 616, *cert. denied,* 21 P.3d 218 (Utah 2001). "When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." *Varian-Eimac, Inc. v. Lamoreaux,* 767 P.2d 569, 570 (Utah Ct.App.1989).

CONCLUSION

**22 Due to the untimeliness of the motion for new trial, the time period for filing the notice of appeal was not tolled, and therefore, the notice of appeal was untimely. Accordingly, we dismiss this appeal for lack of jurisdiction.

**23 WE CONCUR: JUDITH M. BILLINGS, Presiding Judge, and JAMES Z. DAVIS, Judge.

98 P.3d 46, 506 Utah Adv. Rep. 9, 2004 UT App 266

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Addendum B

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

The State of Utah,

Respondent,

v. Case No. 20041012-SC

Shayne E. Todd,

Petitioner.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on November 24, 2004.

IT IS HEREBY ORDERED, pursuant to Rule 45 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted only as to the following issue:

Whether an oral announcement of sentence prior to entry of judgment constitutes an imposition of that sentence for purposes of rule 24(c) of the Rules of Criminal Procedure.

FOR THE COURT:

February 10, 2005
Date

Christine M. Durham
Chief Justice

Addendum C

(a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

(b) A motion for a new trial shall be made in writing and upon notice. The motion shall be accompanied by affidavits or evidence of the essential facts in support of the motion. If additional time is required to procure affidavits or evidence the court may postpone the hearing on the motion for such time as it deems reasonable.

(c) A motion for a new trial shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period.

(d) If a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either in evidence or in argument.

Rule 4. Appeal as of right: when taken.

(a) *Appeal from final judgment and order.* In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) *Motions post judgment or order.* If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion is filed in the trial court (1) for a new trial under Rule 24 of the Utah Rules of Criminal Procedure; or (2) to withdraw a plea under Utah Code Ann. § 77-13-6, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying the motion to withdraw the plea. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) *Filing prior to entry of judgment or order.* Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) *Additional or cross-appeal.* If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) *Extension of time to appeal.* The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) *Appeal by an inmate confined in an institution.* If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. If a notice of appeal is filed in the manner provided in this paragraph (f), the 14-day period provided in paragraph (d) runs from the date when the trial court receives the first notice

Addendum D

DAVID V. FINLAYSON (6540)
OTIS STERLING, III (7636)
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ATTORNEYS FOR DEFENDANT
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Telephone: 532-5444

IN THE THIRD DISTRICT COURT, IN AND FOR SALT LAKE COUNTY

STATE OF UTAH, SALT LAKE DEPARTMENT

STATE OF UTAH, Plaintiff, v. SHAYNE E. TODD, Defendant.	:	**MOTION FOR NEW TRIAL AND SUPPORTING MEMO, REQUEST FOR ADDITIONAL TIME TO SUBMIT EVIDENCE, AFFIDAVITS AND TRANSCRIPTS** Case No. 991906743FS JUDGE: FUCHS

COMES NOW the defendant SHAYNE E. TODD, by and through his counsel of record, and moves this Court for a new trial pursuant to Rule 24 of the Utah Rules of Criminal Procedure. This motion is based upon the following: The State improperly argued the state of the law and how the facts should be applied which confused the jury and violated Mr. Todd's right to counsel and a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 7, 11 and 12 of the Utah Constitution. Mr. Todd requests a hearing and additional time to prepare affidavits and transcripts in support of his motion.

RELEVANT FACTS AND PROCEDURE

Mr. Todd was convicted by jury verdict of Criminal Homicide, Murder on January 23, 2001. He was sentenced by this Court on March 14, 2001. Mr. Todd's foremost claim of error is that during the closing arguments, the State misdirected the jury by arguing improperly that facts surrounding the shooting of the victim, which were not the cause of her death, could be used in consideration of Depraved Indifference and Act Clearly Dangerous theories of Murder. Defense counsel made a motion for mistrial or in the alternative, that those alternative theories be withdrawn from the jury. Counsel's motion and request was denied and the jury was not further instructed. During deliberation, the Jury submitted a question to the Court regarding the very issue of causation asking:

> The defense in their closing indicated that the only act we were to consider was the shooting of the gun. (Which was the actual action which led to Stephanie's death.) Mr. Finlayson said we were not to consider the drive through the parking lot with Stephanie hanging onto the Blazer as part of the act that led to her death; is this correct?

The court did not notify counsel of the question but answered the question by telling the jury, "you can– the fact that she was hanging onto the Blazer was the factual testimony that was factual, but that in regards to their question, they had to look to the jury instructions for any answers" The question was written and made part of the record. The answer from the court was apparently in person and not written.

ARGUMENT

Pursuant to Rule 24, this Court may grant defendant a new trial "in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon [his] rights." This

Court has considerable discretion to grant a new trial. See State v. Williams, 712 P.2d 220 (Utah 1985); State v. Smith, 776 P.2d 929 (Utah 1989).

I. THE COURT SHOULD HAVE GRANTED HE MOTION FOR MISTRIAL OR WITHDRAW THE ALTERNATIVE THEORIES FROM THE JURY

In sum, Mr. Todd's main contention is that the State presented evidence that the victim, Stephanie Todd, was killed from a gun-shot would to the head. There was no evidence that she died as a result of falling from the vehicle. Yet the State argued that the act of Mr. Todd driving the 1100 feet through the parking lot with Stephanie hanging on should be considered as part of the act in its alternative theories of Murder. The jury was clearly confused on the issue as evidenced by the question to the court. As a result, Mr. Todd was denied his right to counsel and a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 7, 11 and 12 of the Utah Constitution and should be granted a new trial.

Because of the amount of information presented in the nine day trial, counsel requests additional time to have transcripts prepared and to submit a supplemental memorandum. Counsel also requests a hearing.

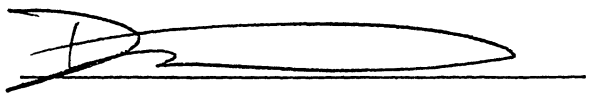
Respectfully submitted this 22nd day of March, 2001

DAVID V. FINLAYSON
Attorney for Defendant

OTIS STERLING, III
Attorney for Defendant

CERTIFICATE OF MAILING

MAILED/DELIVERED a copy of the foregoing to Dane Nolan of the Salt Lake District Attorney's Office this 22nd day of March, 2001.



Addendum E

THIRD DISTRICT COURT SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCING SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 991906743 FS
SHAYNE E TODD, Defendant.	:	Judge: DENNIS M. FUCHS Date: March 14, 2001

PRESENT
Clerk: wendypg
Reporter: AMBROSE, EILEEN
Prosecutor: NOLAN, DANE C
Defendant
Defendant's Attorney(s): FINLAYSON, DAVID V

DEFENDANT INFORMATION
Date of birth: April 30, 1971
Video

CHARGES

1. MURDER - 1st Degree Felony
   Plea: Not Guilty - Disposition: 01/23/2001 Guilty
2. PURCH/POSS DANGEROUS WEAPON - 2nd Degree Felony
   Plea: Not Guilty - Disposition: 11/16/2000 Guilty

HEARING

The above entitled case comes before the court for sentencing. Defendant transported from the prison.
Counsel addresses the court requesting the psychological records be made a part of the pre-sentence report. Court so orders.
Court orders DA to preserve all evidence pending an appeal.

Case No: 991906743
Date: Mar 14, 2001

SENTENCE PRISON

Based on the defendant's conviction of MURDER a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of PURCH/POSS DANGEROUS WEAPON a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Court orders count 1 and count 2 to run consecutive. Also this case is to run consecutive with any others defendant is serving time on.

Dated this 28 day of March, 20 01

DENNIS M. FUCHS
District Court Judge
By _____
STAMP USED AT DIRECTION OF JUDGE

Addendum F

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	
SHAYNE E. TODD,	:	Case No. 20030157-CA
	:	
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for murder, a first degree felony offense under Utah Code Ann. § 76-5-203 (1999), and possession of a dangerous weapon by a restricted person, a second degree felony offense under Utah Code Ann. § 76-10-503(3) (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Dennis M. Fuchs, Judge, presiding.

LINDA M. JONES (5497)
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Salt Lake City, Utah 84111

Attorney for Defendant/Appellant

J. FREDERIC VOROS, JR. (3340)
ASSISTANT ATTORNEY GENERAL
MARK L. SHURTLEFF (4666)
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Salt Lake City, Utah 84114-0854

Attorneys for Plaintiff/Appellee

2. *Section 78-2a-3(1)(b) and* Boggess *Ensure This Court's Authority to Consider the Issues on Appeal in this Matter.*

The state claims that if this Court considers the notice of appeal to be untimely, the Court must dismiss the appeal. That would be unfair to Todd. As set forth in the opening Brief of Appellant, November 5, 2003, this Court filed a Sua Sponte Motion for Summary Disposition in this case, and asked the parties to state why the appeal should not be dismissed. (Sua Sponte Motion.) In response, Todd maintained the notice of appeal was timely. He asked the Court to proceed with the appeal on the merits. (See Memorandum in Opposition to Sua Sponte Motion for Summary Dismissal, dated May 28, 2003.)

In the alternative, Todd requested remand for resentencing *nunc pro tunc* so that he could file an amended notice of appeal before proceeding to full briefing on the issues. (Id.); see Manning v. State, 2004 UT App 87, ¶¶10-11, 24 (resentencing is appropriate where a defendant, who wishes to timely appeal, files an untimely notice due to circumstances that are not his fault). This Court then withdrew its sua sponte motion and ordered full briefing. (Order, dated August 22, 2004.) There is no reason now to delay resolution of the appeal on the merits here.

Assuming *arguendo* the notice here was untimely, controlling authority supports this Court's jurisdiction over the case. Pursuant to § 78-2a-3(1)(b), a remedy exists: this Court may issue any process necessary "in aid of its jurisdiction" over the appeal. Boggess v. Morris, 635 P.2d 39 (Utah 1981), is in accord. There, defendant was convicted of manslaughter on June 19, 1978. Id. at 40. On January 3, 1979, defendant

filed a notice of appeal. Neither the parties' briefs on appeal nor the record "disclosed any facts explaining why defendant's appeal was submitted so far out-of-time." Id. After briefing, the supreme court dismissed the appeal on jurisdictional grounds. Id.

When the case was returned to the lower court, defendant filed a writ of habeas corpus and developed a record to reflect why the notice of appeal was untimely. Id. at 40. According to the record, after defendant was convicted, he advised counsel he did not want to appeal. When defendant arrived at the prison, he changed his mind. He wrote a letter to his attorney, and the attorney received the letter on "July 18th, the day before the time for appeal expired." Id. The attorney took no action. Id. Based on those facts, the habeas court granted defendant permission to file an "out-of-time appeal" and directed defendant "to return to the district court for further relief if [the Utah Supreme Court again] refused to entertain that appeal." Id. at 40. Defendant again proceeded with the appeal, only to have the supreme court reject it. When defendant returned again to the habeas court, that court entered an order to grant the habeas petition and to release the defendant from prison if the supreme court refused to address the substantive merits of the case. Id. at 41. At that point in the proceedings, the state appealed. Id.

The supreme court considered the issues and identified an acceptable solution to the matter. Id. at 42. Specifically, the court considered the post-conviction habeas relief to be appropriate when "defendant's claim is based on allegations that *have not been established as facts*." Id. (emphasis added). However, once facts supporting the reason for an untimely notice of appeal have been developed, "it would be needlessly circular to

require that defendant return to the district court to re-establish the facts by a post-conviction hearing and then to be resentenced to qualify for a direct appeal. In this exceptional circumstance, there is a more direct remedy." Id. The court used the common-law writ[4] as a basis for reaching the criminal case where the record supported defendant's right to appeal, and it supported that the right was compromised due to statutory time limits and through no fault of the defendant. Id. at 41-42. Boggess supports application of the common-law writ. It has broad application. It should not be read to support that a defendant must proceed through "the habeas corpus merry-go-round," id. at 41, as described there, before he may be heard on appeal in the criminal case.

Indeed, in Boggess, *the facts* developed in the habeas proceedings *and the common-law writ,* opened the door for direct review.

> [W]here a timely appeal to this Court was prevented by circumstances that admittedly constituted a denial of defendant's constitutional rights to appeal, we exercise our discretion to issue the common-law writ of certiorari to bring up the record and allow defendant a direct review in this Court of the alleged errors in his trial for manslaughter, on the merits, just as if he had taken an appeal within the statutory period. The briefs filed by the parties in No. 16232 are hereby received as the briefs in this case, with either party to have leave to supplement them within thirty days.

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4 When Boggess was published, the Utah Constitution empowered the appellate court to issue the "common-law writ of certiorari" in aid of jurisdiction. Boggess, 635 P.2d at 42; Utah Cons. art. VIII, § 4 (1953) (stating the "Supreme Court shall have appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction"). That power differed from the "various statutory enactments authorizing specialized uses of the writ of certiorari," in cases involving, *e.g.*, public service commission orders or worker's compensation awards. Boggess, 635 P.2d at 42 & n.6.

Today, Utah Code Ann. §§ 78-2-2(2) and 78-2a-3(1)(b) (2002) allow the appellate courts to issue the writ and any process necessary in aid of their jurisdiction.

Id. at 43. The lessons of Boggess apply here.

The *facts of record* support Todd's intent to timely appeal. Todd filed a new trial motion within 10 days after the trial court imposed sentence in open court. (R. 678; 516-18.) Todd filed a notice of appeal within 30 days after the entry of an order on the new trial motion. (R. 592-94; 632-33.) To the extent the notice of appeal was untimely, it was through no fault of Todd. Todd respectfully urges this Court to exercise its discretion to issue the *common-law writ* of certiorari to allow direct review. Boggess, 635 P.2d at 42-43. The briefs filed by the parties should be received for the substantive appeal from the criminal conviction. Id.; see also Barnard v. Murphy, 882 P.2d 679, 681 (Utah Ct. App. 1994) ("More specifically, 'the authority to issue a writ in aid of appellate jurisdiction "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected"'") (cites omitted).

CONCLUSION

For the reasons set forth herein, Todd respectfully requests that this Court reverse the conviction and remand this case to the trial court for a new trial.

SUBMITTED this 22nd day of April, 2004.

LINDA M. JONES
SALT LAKE LEGAL DEFENDER ASSOC.
COUNSEL FOR DEFENDANT/APPELLANT